

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DARRYL FORD	:	CIVIL ACTION
	:	
vs.	:	
	:	
JOHN STEPANIK, SUPERINTENDENT,	:	
SCI-DALLAS; LYNNE ABRAHAM, DISTRICT	:	
ATTORNEY OF PHILADELPHIA	:	
COUNTY; AND THE ATTORNEY GENERAL	:	
OF THE COMMONWEALTH OF PENNSYLVANIA	:	NO. 97-2116

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 2nd day of June, 1998, upon consideration of the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Document No. 1 , filed March 24, 1997); Response to Petition for Writ of Habeas Corpus (Document No. 11, filed July 16, 1997); Report and Recommendation of Magistrate Judge Arnold C. Rapoport (Document No. 12, filed August 5, 1997); petitioner's Objections to the August 5, 1997 Magistrate's Report and Recommendation (Document No. 13, filed August 13, 1997); and the Response to Petitioner's Objections to the Magistrate's Report and Recommendation (Document No. 14, filed August 18, 1997); **IT IS ORDERED THAT:**

1. The Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DENIED**; and
2. Petitioner has not made a substantial showing of a denial of a constitutional right, and a certificate of appealability will not be issued.

MEMORANDUM

I. Background

On June 27, 1980, petitioner was convicted in the Court of Common Pleas of Philadelphia

on three counts of first degree murder, arson, causing a catastrophe, and criminal conspiracy. These charges arose from the fire bombing of two homes on December 3, 1977 which resulted in the deaths of a woman and two children. At trial, the Commonwealth contended that members of the Taylor Street gang, of which petitioner was a leader, committed the firebombings as part of a “gang war” with the Pierce Street gang. Two co-defendants, Fitzgerald Lawrence and Alex Harper, testified for the Commonwealth and implicated petitioner in the crimes. Five co-defendants were also found guilty of felonies arising from the same acts.

On appeal, petitioner and his co-defendants argued, inter alia, that the trial judge erred by not allowing defendants to introduce evidence or cross-examine Fitzgerald Lawrence about his history of “schizophrenia, paranoid type with features of depression [and] mental retardation” and medication for those conditions. Commonwealth v. Mason, 518 A.2d 282, 286 (Pa. Super. Ct. 1986) appeal denied Commonwealth v. Miller, 533 A.2d 711 (Pa. 1987) (table).

The Superior Court affirmed the conviction and sentence of petitioner, ruling that by failing to submit post-trial motions, he had not preserved any issues for appeal. Id. at 285. New trials were ordered for two defendants because Lawrence was the only witness who testified to their involvement in the crimes, and the Superior Court concluded that impeachment based on his psychological impairments was “vital” to the defense of those defendants. Id. at 287. The court also held the exclusion of the impeaching evidence was harmless error as to three other co-defendants, because, in addition to Lawrence, they had been implicated by two witnesses, also co-defendants who pleaded guilty and cooperated with the Commonwealth. Id. at 287. Petitioner did not file a petition for allowance of appeal with the Supreme Court of Pennsylvania.

On May 5, 1988, petitioner filed a Post Conviction Relief Act (“PCRA”), 42 P.S.A.

§ 9541 et seq., petition, pro se, which was dismissed on August 15, 1989 when appointed counsel failed to amend the petition. Commonwealth v. Ford, June Term, 1979, Nos. 805-811, slip op. at 1. Petitioner's second PCRA petition was filed by counsel on January 7, 1992. In it, he asserted, inter alia, three claims: (1) trial counsel was ineffective for failing to object to the exclusion of evidence about Lawrence's mental illness and failing to file post-trial motions on that issue; (2) the trial court erred in excluding testimony about Lawrence's mental health; and (3) the Superior Court, on appeal, improperly allowed the testimony of one accomplice to corroborate the testimony of another accomplice.

The second PCRA petition was denied on March 17, 1994, and the Superior Court affirmed the denial on August 23, 1995. Commonwealth v. Ford, No. 01166 Phila. 1994, slip op. at 1, (Pa. Super. Ct. August 23, 1995). The Superior Court determined that petitioner had waived all three claims, had not presented evidence to prove the miscarriage of justice necessary to overcome the waiver, and therefore was not eligible for relief under The PCRA. Id. at 6, 9, 11. The court also addressed, in the alternative, the substance of the claims and found them to be without merit. Id. The Supreme Court of Pennsylvania denied allocatur on March 12, 1996. Commonwealth v. Ford, No. 704 E.D. Allocatur Docket 1995.

On March 24, 1997, petitioner filed the habeas Petition presently before the Court.¹ In the

¹ The Court concludes that Ford's petition is not precluded by the one-year statute of limitations period of the Antiterrorism and Effective Death Penalty Act of April 24, 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214 (codified at and amending 28 U.S.C. § 2244 et seq.). The AEDPA provides that a one-year statute of limitations applies to § 2254 motions and generally shall run from the date on which the judgment of conviction became final. See 28 U.S.C. § 2244(d)(1)(1997).

The Third Circuit has held that if a petitioner's conviction became final prior to the effective date of the AEDPA, a habeas petition "filed on or before April 23, 1997 [one year after the effective date of the AEDPA] may not be dismissed for failure to comply with § 2244(d)(1)'s time limit." Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998); see, also, Miller v. New Jersey State Dep't of Corrections, No. 97-5611, slip op. at 3 (3d Cir. May 26, 1998).

Petition, he alleges that: (1) the trial court erred by excluding evidence of Lawrence's medical condition; (2) the Superior Court, on direct appeal, "erroneously applied the harmless error doctrine" to petitioner; and (3) his attorney provided ineffective assistance of counsel by failing to object at trial to the exclusion of evidence about Lawrence's mental illness. In the Memorandum accompanying the Petition, petitioner expanded on his second and third claims. With regard to the second claim, petitioner asserted that the Superior Court erred on direct appeal by allowing the testimony of one accomplice, Harper, to corroborate the testimony of another accomplice, Lawrence; and relying on that improper corroboration, the court erroneously concluded that the exclusion of evidence about Lawrence's mental condition was "harmless error" to petitioner. With regard to the third claim, petitioner contended in the Memorandum that petitioner's counsel was ineffective both for failing to object at trial to the exclusion of evidence about Lawrence's mental impairments, a claim raised in the Petition, and for failure to file a post-trial motion on that issue, a claim not raised in the Petition. The Court will address the latter claim as if it was raised in the Petition, both because it is factually related to the claim of failure to object at trial, and because respondents have addressed both claims.

On March 27, 1997, the Court referred this case to Magistrate Judge Arnold C. Rapoport. Magistrate Judge Rapoport issued a Report and Recommendation on August 5, 1997, recommending that the petition for writ of habeas corpus be dismissed in part for failure to exhaust state remedies and be denied in part for failure to prove that counsel was constitutionally ineffective and that

In this case, petitioner's motion was filed on March 24, 1997, more than one year after his judgment of conviction became final on January 2, 1987, but exactly eleven months after the effective date of the AEDPA. Therefore, the Court finds that petitioner's motion was filed within a "reasonable period of time" and is not time barred.

petitioner was prejudiced by his attorney's actions. Petitioner filed Objections to the August 5, 1997 Magistrate's Report and Recommendation on August 13, 1997. Respondents filed a Response to Petitioner's Objections to the Magistrate's Report and Recommendation on August 18, 1997.

II. Legal Analysis

A. Exhaustion and Procedural Bar

1. Exhaustion

Before a federal court may consider a habeas petition from a state prisoner, the prisoner must have "exhausted" his claims -- presented them to state tribunals for relief. See 28 U.S.C. § 2254(b)(1)(A). Exhaustion "serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). "The state courts need not discuss or base their decisions upon the presented claims for those claims to be considered exhausted." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996).

In this case, petitioner has presented all of his claims to Pennsylvania courts. His claim of trial court error was presented on direct appeal and in his 1992 PCRA petition, and his claims of ineffective assistance of counsel and error by the Superior Court on direct appeal were also presented in his 1992 PCRA petition. Therefore, all of petitioner's claims have been exhausted.

2. Procedural Bar

A federal court may not consider a claim, even one that is exhausted, if a state court denied the claim because the petitioner failed to comply with an "independent and adequate" state

procedural requirement.

An “independent and adequate” state procedural requirement is one that is “both ‘independent’ of the merits of the federal claim and an ‘adequate’ basis for the decision.” Harris v. Reed, 489 U.S. 255, 260 (1989). “A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts’ refusal in this instance is consistent with other decisions.” A state rule is adequate only if it is “‘consistently and regularly applied.’” Doctor, 96 F.3d at 683-684 (internal citations omitted).

There is one exception to this rule. A federal court may hear a claim which has been denied on an “independent and adequate” state procedural ground, if the petitioner can show “cause” for the procedural default and “prejudice” resulting from the default. To demonstrate cause, a petitioner must prove “that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.” Murray v. Carrier, 477 U.S. 478, 488 (1986). “Counsel's error cannot constitute cause for procedural default unless the error was also constitutionally ineffective....” Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir.1996) (citing Murray, 477 U.S. at 492). Actual prejudice must also be proved, requiring that petitioner show that the outcome was “unreliable or fundamentally unfair” as a result of the alleged violation of federal law. Lockhart v. Fretwell, 506 U.S. 364, 366, (1993); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991).

In this case, the state PCRA court denied petitioner’s claims on procedural grounds, so the Court must determine whether those grounds were “independent and adequate.” The fact that the PCRA court addressed, in the alternative, the merits of the claims, does not affect the analysis of

whether the procedural grounds on which the denial was actually based were “independent and adequate.” Harris, 489 U.S. at 264 n.10.

a. Claim of Trial Court Error

The PCRA court denied petitioner’s claim of trial court error because on direct appeal, the Superior Court found that petitioner had waived the claim by failing to file post-trial motions. Pennsylvania’s requirement that an issue be presented in post-trial motions for it to be raised on appeal is an “independent and adequate” state procedural ground for denying a claim. Neely v. Zimmerman, 858 F.2d 144 (3d Cir. 1988). Petitioner has failed to show any objective cause for this procedural waiver.² Therefore, this Court is precluded from addressing the merits of this claim and denies it.

b. Claim of Error by the Superior Court on Direct Appeal

The PCRA court also found that petitioner had waived his claim that the Superior Court had erred on direct appeal by allowing one accomplice’s testimony to corroborate testimony of another accomplice. The PCRA court’s decision was based on the fact that petitioner did not appeal to the Pennsylvania Supreme Court from the Superior Court’s decision on direct appeal and did not raise the claim in his first PCRA petition. Commonwealth v. Ford, No 01166 Philadelphia 1994, slip op. at 11 n. 6. (Super. Ct. August 23, 1995).

On appeal from the PCRA court’s denial, the Pennsylvania Supreme Court denied allocatur without comment. When a state court issues an unexplained denial of a claim, a federal court must

² Ineffective assistance of counsel would be “objective cause” for the procedural default. See Sistrunk, 96 F.3d at 675 (citing Murray, 477 U.S. at 492). However, as discussed, infra, petitioner did not prove that his counsel was constitutionally ineffective because of the failure to establish prejudice. See, infra, Section II.C.2.

“look through” to the previous state court judgment on the same claim and presume that the unexplained denial rests on the same grounds. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). Therefore, the Court must “look through” to the Superior Court’s opinion, as the last state court to articulate its reasons for denying petitioner’s PCRA petition, to determine whether the denial of this claim was based on an “independent and adequate” state procedural rule.

In 1995, when the Superior Court ruled on the PCRA petition,³ The PCRA provided that: “an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding . . .” 42 Pa. C.S.A. § 9544(b) (West 1994). However, The PCRA also provided an exception to this rule, and allowed a waived claim to be adjudicated on the merits if the waiver did “not constitute a State procedural default barring Federal habeas corpus relief.” 42 Pa. C.S.A. § 9543(a)(3)(iii) (West. 1994); see also Commonwealth v. Crawley, 663 A.2d 676, 678-70 (Pa. 1995) cert. denied 517 U.S. 1212 (1996). Because a state court was required to consider federal habeas law to determine whether a claim was waived, the PCRA waiver provision was not “independent” of federal law. Thus, the basis for the Superior Court’s denial of this claim was not an “independent and adequate” state ground, and the Court will address the merits of petitioner’s claim of error by the Superior Court on direct appeal. Cf., Smith v. Vaughn, No. 96-8482, 1997 WL 338851 at *4 (E.D. Pa. June 17, 1997) (PCRA waiver provision is an “independent and adequate” state procedural ground); Diventura v. Stepanik, No. 95-0443, 1996 WL 107852 (E.D. Pa. March 11, 1996) (same).

c. Claim of Ineffective Assistance of Counsel

³ The PCRA was amended on November 17, 1995. P.L. 1118, No. 32 § 3(1) (November 17, 1995). The Superior Court ruled on petitioner’s PCRA petition on August 23, 1995.

Respondents concede that the Court may address the merits of petitioner's ineffective assistance of counsel claim, Response to Petition for Writ of Habeas Corpus at 3, and have therefore waived the argument that petitioner's ineffective assistance of counsel claim is procedurally barred. Accordingly, the Court will address the merits of this claim as well.

C. The Merits of the Two Remaining Claims

The Court has concluded that it may not reach the merits of petitioner's claim of trial court error, as that claim was denied in state court on an "independent and adequate" state ground. The Court has also concluded that it may address the merits of the two remaining claims -- the claim of error by the Superior Court on direct appeal and the claim of ineffective assistance of counsel -- and will proceed to do so.

1. Claim of Error by the Superior Court on Direct Appeal

Petitioner claims that on direct appeal, the Superior Court improperly allowed the testimony of one accomplice to corroborate the testimony of another accomplice; and the court, relying on the improper corroboration, erroneously concluded that the exclusion of testimony about Lawrence's mental health was harmless error as to petitioner.

However, the Superior Court on direct appeal did not address the substance of petitioner's claims. Rather, the court affirmed petitioner's conviction and sentence because he failed to file post-trial motions. Mason, 518 A.2d at 285. As to petitioner's co-defendants, the Superior Court merely stated that they had been implicated by two other witnesses. Id. at 286. The court did not use the testimony of either of those witnesses to corroborate the testimony of other co-defendants. Id. at 286-287. Therefore, this claim is without merit and is denied.

2. Claim of Ineffective Assistance of Counsel

To prove ineffective assistance of counsel, petitioner must meet the requirements of both prongs of the test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must first show that his attorney's actions fell below "an objective standard of reasonableness" so that he was not "functioning as the counsel guaranteed by the Sixth Amendment," Id. at 687-88. Second, petitioner must show prejudice from his attorney's errors: a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Assuming, arguendo, that petitioner's counsel at trial was constitutionally ineffective, petitioner must still prove that but for his attorney's failure to object to the exclusion of evidence about Fitzgerald Lawrence's mental conditions and his attorney's failure to file post-trial motions on that issue, the Superior Court would have granted petitioner a new trial. As petitioner has failed to do this, and has thus not satisfied the second prong in the Strickland test, this claim is denied.

a. Petitioner Has Not Shown Prejudice as a Result of His Attorney's Alleged Ineffectiveness

The Superior Court granted new trials to two of petitioner's co-defendants because Lawrence was the sole witness to implicate them. Mason, 518 A.2d at 286. The Superior Court determined that the exclusion of evidence of Lawrence's mental condition was "harmless error" as to three co-defendants who had been implicated by two witnesses in addition to Lawrence. Id. at 286-287.

Petitioner was implicated both by Lawrence, see, e.g., N.T., June 16, 1979 at 1118-1132, and by Alex Harper. See, e.g., N.T., June 12, 1979 at 875-876. Harper testified that petitioner was a leader in the Taylor Street gang, Id. at 869, that during a telephone conversation, Harper heard

petitioner tell Lawrence to get gasoline, id. at 875, and that during the same conversation, petitioner told Harper to obtain bottles and make some cocktails, which Harper understood to mean firebombs. Id. at 876. Unlike the defendants to whom the Superior Court granted new trials, petitioner was implicated in the crimes by two witnesses.

Another cooperating co-defendant, Keith Woodward, also testified that petitioner was a leader in the Taylor Street gang. N.T., June 18, 1980, at 1454, 1456. As petitioner was “charged with criminal conspiracy, evidence of the gang activity in the present case is highly probative of whether a conspiracy existed.” Mason, 518 A.2d at 291 quoting Commonwealth v. Gwaltney, 442 A.2d 236, 241 (Pa. 1982).

In addition, Fitzgerald Lawrence’s testimony was impeached on many grounds. On cross-examination, Lawrence acknowledged that he had been taking Valium and was “high on pot” on the day of the fire bombings. N.T., June 16, 1980, at 1169-70, and that he was taking Thorazine, which had been prescribed for him by a doctor while he was in the hospital. Id.⁴

Attorneys for petitioner’s co-defendants cross-examined Lawrence on numerous prior inconsistent statements. See, e.g. N.T., June 16, 1980, at 1204, N.T., June 17, 1980 at 1359, 1394, 1398. Lawrence also acknowledged that he was currently serving a life sentence for another murder, N.T., June 16, 1980 at 1253-54; that he would receive a reduced sentence with regard to the firebombings for agreeing to testify; id. at 1259-61; that he was not going to be sentenced until after he had testified at the trial; id. at 1266-67, and that the district attorney had agreed to assist Lawrence

⁴ The transcription of the cross-examination of Lawrence by an attorney for one of petitioner’s co-defendants refers both to drugs identified as “Noresine.” N.T., June 16, 1980, at 1170, and as “Thorazine.” Id. at 1207. As the Court cannot identify any drug named “Noresine” or a drug with a similar spelling, and there is no other reference to “Noresine” in the Record, the Court concludes that the attorney referred to Thorazine and it was mis-transcribed.

in his application for parole. Id at 1265-66.

Many issues relating to Lawrence's credibility as a witness were brought to the jury's attention. In addition, Lawrence did testify, albeit briefly, about his use of Valium and Thorazine. Petitioner was also independently implicated in the fire bombings by Alex Harper. For these reasons, the Court concludes that even if petitioner's trial attorney had properly objected to the exclusion of the evidence about Lawrence's mental condition and had filed post-trial motions on the issue, the Superior Court would not have granted petitioner a new trial. Thus, petitioner has not established prejudice from his attorney's actions in this regard and has failed to satisfy the second prong of the Strickland test. Therefore, this claim is denied.

III. Conclusion

Petitioner presented three claims in his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. One of those claims, his claim of error by the trial court, was denied by the state PCRA court on an "independent and adequate" state procedural ground. Thus, the Court is precluded from addressing the merits of this claim. The Court addressed the merits of petitioner's claim of error by the Superior Court on direct appeal and petitioner's claim of ineffective assistance of counsel. The Court concluded that neither of these claims had merit. Therefore, the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is denied.

BY THE COURT:

JAN E. DUBOIS, J.